



Commonwealth of Massachusetts

State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-92-10

FACTS:

You are the members of the Board of Selectmen in a town (Town). For several years, the Town has actively opposed the development of a privately owned project to be located in a neighboring town (Town II), just over the Town's border. The Town has retained a law firm as special town counsel in connection with this matter. Similarly, a citizens group composed of Town and Town II citizens has also opposed the project and has retained another law firm (the "law firm") for the same purpose.

Presently pending in Superior Court are two actions filed by the Town and the private group which seek to overturn approval given to the project developer by a state agency. These two actions have been consolidated, and the Town and the private group have jointly prepared pleadings and memoranda.

The Town would like to pool its resources with the private group through an appropriate Town Meeting mechanism to fund the services of the law firm for future administrative and judicial litigation. Both the Town and the private group have limited resources available to oppose the project and believe that the pooling of resources would advance a compelling interest of the Town. In connection with this desire, the Town has proposed the adoption of a by-law to ensure compliance with G.L. c. 268A, §17. The by-law, if adopted, would define the official duties of a special town counsel to include, on a case-by-case basis, representation of individual citizens in matters in which the Town is also a party. Specifically, the by-law states that:

The purpose of this by-law is to allow the Town from time to time to retain counsel who may also represent individual citizens in matters in which the Town is also a party without violating G.L. c. 268A, §17(a) and §17(c). Such dual representation allows the Town to pool resources for a common purpose and preserve scarce Town funds.

Pursuant to this by-law, the official duties of special town counsel include representing individual citizens in administrative and judicial proceedings in which the Town is also a party, provided the interests of the Town would be advanced by such dual representation and provided that such dual representation would not cause a violation of rules governing attorney conduct. Special town counsel shall discharge such duties only when requested to do so in writing by the Board of Selectmen. Prior to making such a request, the Board of Selectmen shall consult with town counsel, who shall advise the Board as to whether the interests of the Town would be advanced by such dual representation. Town counsel shall also supervise special town counsel in such instances and from time to time shall render advice to the Town as to whether this dual representation advances the interests of the Town and conforms to law.

QUESTION:

Assuming that the above by-law is duly adopted by the members of the Town Meeting, would the by-law permit a special town counsel to represent, and be compensated by, both the Town and private parties in connection with the same particular matters within the confines of G.L. c. 268A, §17?

ANSWER:

Yes, because the by-law, which requires a case-by-case determination as to whether the dual representation would advance the interests of the Town, reflects an explicit legislative authorization for all such contemplated arrangements.

DISCUSSION:

Section 17(a) of c. 268A, the Massachusetts conflict of interest statute, provides that no municipal employee^{1/} shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation^{2/} from anyone other than the city or town or municipal agency in relation to any particular matter^{3/} in which the same city or town is a party or has a direct and substantial interest.

Section 17(c) of c. 268A provides that no municipal employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the city or town or municipal agency in prosecuting any claim against the same city or town, or as agent or attorney for anyone in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest.

Together, these sub-sections of c. 268A are designed to prohibit divided loyalties. In other words, a municipal employee is a municipal employee first and foremost and owes a duty of loyalty to the municipality. Consequently, §17 is designed to prohibit an individual from splitting his loyalties between a municipal job and a private interest. See *EC-COI-92-4* (discussing state counterpart provision, §4); see also *EC-COI-92-1*; *90-12*; *90-16*; Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U.L. Rev. 299, 322 (1965) (whenever a person is both a private and a public employee, “[t]he appearance of potential impropriety is raised - influence peddling, favoring his private connections, and cheating the government. Whether or not any or all of these evils result, confidence in government is undermined because the public cannot be sure that they will not result”); *Commonwealth v. Canon*, 373 Mass. 494, 504 (1977) (dissent) (§17(a) reflects the maxim that “a man cannot serve two masters.” It seeks to preclude circumstances leading to a conflict of loyalties by a public employee. As such, it does not require a showing of any attempt to influence - by action or inaction - official decisions. What is required is merely a showing of an economic benefit received by the employee for services rendered or to be rendered to the private interests when his sole loyalty should be to the public interest).

In *Town of Edgartown v. State Ethics Commission*, 391 Mass. 83 (1984), the Massachusetts Supreme Judicial Court held that a private attorney^{4/} was barred by §17 from simultaneously acting as attorney for private parties and for the Town of Edgartown in a “common defense effort on liability” in an Indian land claim case pending in federal court, even though the interests were not adverse. The Court found that the

language of the statute unambiguously prohibits the multiple representation at issue here. Had the Legislature intended that these prohibitions be limited to matters in which the municipal employee is an *adverse* party or has a direct and substantial *adverse* interest, the Legislature easily could have accomplished that by inserting the word “adverse” before “party” and before “interest,” or by employing some other equally simple language.

Id. at 87 (emphasis in original); see also *Commission Advisory No. 13(Agency)*.

Even *Edgartown* makes clear, however, that §17 provides for such dual representation under certain circumstances. *Id.* at 87 (“[t]he only limitation on the statute’s broad prohibition of multiple representation is for conduct by an employee `as provided by law for the proper discharge of official duties’”). If the dual representation is provided by law for the proper discharge of official duties, §17 will not proscribe the conduct. G.L. c. 268A, §17(a), (c).^{5/}

We find that a by-law duly enacted by a municipality is a “law” within the meaning of §17. See Amendment Article 2, §6 (as appearing in Amend. Art. 89) of the Amendments to the Massachusetts Constitution which provides that:

Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter.

In addition, the Supreme Judicial Court has often defined the word “law” broadly in appropriate contexts. “The word ‘law’ imports a general rule of conduct with appropriate means for its enforcement declared by some authority possessing sovereign power over the subject.” *Cohen v. Attorney General*, 357 Mass. 564, 570 n. 4 (1970); *Opinion of the Justices*, 262 Mass. 603, 604-605 (1928); see also *Pace v. City of Atlanta*, 135 Ga. Ct. App. 399, 218 S.E.2d 128, 129 (1975) (municipal ordinance is a “special law” because application is limited to municipality).

Further, the legislature has provided that violations of by-laws can be made punishable by a fine of up to \$300 for each offense, and that all such by-laws are “binding upon all inhabitants [of the city or town] and all persons within their limits.” G.L. c. 40, §21.

In the present case, the Town has proposed the enactment of a by-law in order to permit special town counsels to also represent private third parties under certain specified circumstances. We find that the adoption of a by-law, which specifically provides for a case-by-case determination as to whether dual representation advances the interests of the Town, would cause the dual representation and compensation as contemplated thereunder to be “as provided by law for the proper discharge of official duties” within the meaning of §17. See *EC-COI-92-4* (a specifically tailored regulation would be sufficient to permit compensation by third parties under equivalent state statute, §4). Such a by-law would reflect an explicit legislative authorization of the contemplated arrangement each time the Town must address a similar issue. Cf. *EC-COI-92-4*, n. 9 (G.L. c. 15A, §22 did not reflect an explicit legislative authorization of the proposed third party compensation arrangement and, therefore, was not sufficient to make the proposed arrangement “as provided by law”). Consequently, if the proposed by-law is duly adopted by the Town, the Town may hire special counsel who may also represent private parties in connection with the same particular matters in which the Town is a party or has a direct and substantial interest.

We note that the proposed by-law is not inconsistent with the purposes of §17 as interpreted in *Edgartown*, *supra*, in that the by-law would, in effect, authorize a form of “lead counsel” arrangement. *Edgartown* at 90. Thus, we need not decide whether a by-law purporting to authorize some other representation of private parties by municipal employees would pass muster under §17.

This opinion is limited to the application of c. 268A to the circumstances described. Nothing in this opinion should be construed as commenting on the disciplinary rules governing the conduct of attorneys. The Town should undertake a separate inquiry with the Board of Bar

Overseers or the Massachusetts Bar Association for further information concerning rules subject to their jurisdiction and expertise.

Date Authorized: April 13, 1992

¹“Municipal employee,” a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

²“Compensation,” any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another. G.L. c. 268A, §1(a).

³“Particular matter,” any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

⁴The Court noted, in a footnote, that although it was clear that the attorney was retained by Edgartown only for the one case, the attorney was considered by the parties to be a town employee within the meaning of the statute. Generally, an attorney providing legal services to a municipality will become a municipal employee for purposes of the conflict of interest law. See, e.g., *EC-COI-82-46*; *92-6* (which lists factors used by the Commission to determine public employee status); *89-35* (same); cf. *EC-COI-89-6* (employees of a large institution, who were not named in contract with public entity, were not public employees). See also Buss, *supra* at 311 (the statute “leaves no doubt that a lawyer, architect or the like, rendering professional services to a municipal agency whether paid or not would be a ‘municipal employee’”).

In the present case, it is clear that any individual who is appointed as a special town counsel would become a “municipal employee”

within the meaning of c. 268A.

⁵By its own terms, §17(a) prohibits compensation from third parties unless it is provided “by law for the proper discharge of official duties.” On the other hand, §17(c) proscribes acting as agent or attorney, whether compensated or not, unless such actions are within the “proper discharge of his official duties,” without reference to the necessity of a “law.” *Edgartown* held that there are “no meaningful distinctions among these alternative qualifying phrases in the context of this case. [Both] focus on the proper discharge of official duties.” *Id.* at 87, n. 5. However, “the specific application of this qualifying application is not clear.” *Id.*

Compare, however, *EC-COI-83-20* (an attorney employed in the legal department of a state agency may represent a former employee of that agency, for no compensation beyond his own salary, in connection with matters arising from the former employee’s actions as a state official. The attorney’s representation is within the proper discharge of official duties as determined by his superiors and would not violate §4(c)); and *EC-COI-92-4* (a statute or regulation is required to permit a third party to compensate a state employee in relation to matters in which the Commonwealth is a party or has a direct and substantial interest in order to avoid a violation of §4(a)).